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IN THE

Supreme Court Of The United States

October Term, 1982

CHARLES KING ..... Petitioner

versus

COMMONWEALTH OF KENTUCKY ..... Respondent

On Petition for Writ of Certiorari
To the Court of Appeals of Kentucky

REPLY BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

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QUESTIONS PRESENTED:

I. WHETHER RESPONDENT'S OPPOSITION BRIEF MISSTATES THE CRUCIAL FACTS AND MISCONSTRUES THE LAW CONCERNING PETITIONER'S CLAIM THAT THE USE OF TAPED CONVERSATIONS OF NON-TESTIFYING DECLARANTS DENIED PETITIONER'S CONSTITUTIONAL RIGHT TO CONFRONT THE WITNESSES AGAINST HIM?

II. WHETHER RESPONDENT MISCONSTRUES PETITIONER'S ARGUMENT REGARDING THE FACT THAT THE APPLICATION OF THE "RAPE SHIELD STATUTE" VIOLATED PETITIONER'S SIXTH AMENDMENT RIGHT TO CONFRONT WITNESSES AGAINST HIM?

III. WHETHER THE COURT OF APPEALS OF KENTUCKY INCORRECTLY RULED THAT IT WAS NOT NECESSARY TO GIVE THE CORROBORATION INSTRUCTION REQUESTED BY THE PETITIONER?

IV. WHETHER RESPONDENT'S AUTHORITIES ON THE ISSUE OF WHETHER PETITIONER'S TRIAL DENIED HIM DUE PROCESS OF LAW ARE ON POINT?

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REPLY BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Charles King, the petitioner herein, prays that a writ of certiorari issue to review the judgment of the Court of Appeals of Kentucky entered in the above entitled case on December 23, 1981.

OPINION BELOW

The Opinion of the Kentucky Court of Appeals, the order denying the petition for rehearing, and the

order of the Kentucky Supreme Court denying discretionary review are set out in the appendix to the petition.

JURISDICTION

The jurisdiction requisites are adequately set forth in the petition.

CONSTITUTIONAL PROVISIONS INVOLVED

The Constitutional provisions involved are set out in the petition.

STATUTORY PROVISIONS INVOLVED

The statutory provisions involved are set forth in the petition and the brief in opposition to petition for certiorari.

STATEMENT OF THE CASE

Petitioner's version of the statement of the case is set forth in the petition.

REPLY TO RESPONDENT'S REASONS FOR DENYING THE WRIT

I. RESPONDENT'S OPPOSITION BRIEF MISSTATES THE CRUCIAL FACTS AND MISCONSTRUES THE LAW CONCERNING PETITIONER'S CLAIM THAT THE USE OF TAPED CONVERSATIONS OF NON-TESTIFYING DECLARANTS DENIED PETITIONER'S CONSTITUTIONAL RIGHT TO CONFRONT THE WITNESSES AGAINST HIM.

The Respondent's brief at page 10 contains the following statement: "Blevins was most certainly unavailable." The support for this statement is a reference to the record where Respondent's trial counsel says that unless Blevins had changed his mind as of two weeks ago, he would take the Fifth Amendment and would not testify.

The Respondent's statement of fact that Blevins was unavailable is not true.

At no place in the record is there a statement by Blevins or someone on his behalf to the effect that if called, Blevins would avail himself of his privilege not to incriminate himself and would not testify. There was a recorded pre-trial hearing in the case, held on September 4, 1980, in which Blevins' attorney made a statement indicating that if all defendants were tried separately, then the co-defendants would probably be required to take the Fifth Amendment at the separate trials (PT 26). However, Blevins was tried first, and his trial took place on September 16, 1980. The sup-

plemental record on appeal indicates that at Blevins' trial, he took the witness stand, and his testimony at his own trial on September 16, 1980, consumed more than 30 pages of the record. Petitioner's trial did not commence until September 29, 1980, almost two weeks after Blevins' trial.

Leaving aside the question of whether Blevins could have successfully invoked his Fifth Amendment privilege after having testified at length in his own defense, it is false to say that Blevins was unavailable when the record does not show any attempt to inquire of Blevins at Petitioner's trial on what Blevins' position would be if Blevins were called upon to testify.

Respondent also misleads when citing the case of *Commonwealth* v. *Brown*, 619 S.W.2d 699 (Ky. 1981) for the proposition that Respondent could not have called Blevins to the witness stand to determine if the privilege would be invoked. That case only intimates that an inquiry as to whether the privilege will be invoked should be made outside of the presence of the jury. The case cited does not obviate the necessity of making the inquiry.

Likewise, Respondent's brief at page 5 misleads by intimating Blevins had whipped the "victim" with a belt, had blacked her eye, and was brandishing a nightstick in a threatening manner in Petitioner's presence. The record reveals the "victim" not only was not hit with a stick but was not hit with anything else, and Blevins, the husband, had a nightstick in a

bedroom when the two of them were alone (V II 225, 276, 275). The Petitioner was not connected with this.

The cases cited by Respondent either do not speak to the confrontation issue or are not on point.

Respondent's reliance on *St. Clair* v. *United States*, 154 U.S. 134 (1894), *Anderson* v. *United States*, 417 U.S. 211 (1974), and *United States* v. *Rivers*, 468 F.2d 1355 (4th Cir. 1972), *cert. denied*, 411 U.S. 969 (1973) is misplaced because these cases do not deal with confrontation issues but, instead, deal with evidentiary questions.

The other cases relied upon by Respondent are not on point.

United States v. *Jackson*, 588 F.2d 1046 (5th Cir.), *cert. denied*, 442 U.S. 941 (1979) mentions a confrontation issue in a footnote at pages 1049-1050. The footnote reveals a situation where a non-testifying declarant was said to have given a package to a witness to carry from Los Angeles to Birmingham. Inasmuch as the non-testifying declarant's statement was not adverse to the defendant, no confrontation issue was presented.

In *United States* v. *Price*, 577 F.2d 1356 (9th Cir. 1978), *cert. denied*, 439 U.S. 1068 (1979), a co-defendant's attorney was not allowed to cross-examine a police informer concerning her relationship with the police. However, the attorneys for the other co-defendants fully explored the subject. Although

the initial denial of cross-examination was error, it became harmless when the subject was fully explored by others.

Respondent's cited case of *United States* v. *Chee*, 422 F.2d 52 (9th Cir. 1970) is closest to being on point because the defendant in that case in fact raised the confrontation issue. The confrontation issue was decided adversely to the defendant, but *the decision seems to have been made solely upon evidentiary grounds.*

Chee, Id., is a case in which the Ninth Circuit seemed to equate constitutional confrontation values with evidentiary rules. *See, United States* v. *Zentgraf*, 310 F.Supp. 268 (N.D. Cal. 1970). However, *Chee* should be viewed as an isolated case because the Ninth Circuit later expressly recognizes the difference between constitutional values and evidence rules. *See, United States* v. *Fielding*, 630 F.2d 1357 (9th Cir. 1980) and *United States* v. *Nick*, 604 F.2d 1199 (9th Cir. 1979). These later decisions emphasize the question of availability of the non-testifying declarant.

It also should be noted that Respondent neglects to deal with the taped statements of the other non-testifying declarant, Petitioner's son. There is no claim that the son was unavailable.

Further, Respondent misconstrues the Petitioner's position at pages 11 and 12 of the Respondent's brief when Respondent states Petitioner

desires a change in the harmless error rule. Petitioner does not raise this contention. Instead, Petitioner states the use of the tape recording in the instant case cannot constitute harmless error when the Respondent played the tape for the jury four times and later gave the jury a battery operated tape recorder with which to listen to the tape time and time again until the batteries were exhausted.

II. RESPONDENT MISCONSTRUES PETITIONER'S ARGUMENT REGARDING THE FACT THAT THE APPLICATION OF THE "RAPE SHIELD STATUTE" VIOLATED PETITIONER'S SIXTH AMENDMENT RIGHT TO CONFRONT WITNESSES AGAINST HIM.

All of the cases cited by Respondent on this issue may be categorized as holding it is inadmissable to attempt to prove the victim of a rape was not a virgin at the time the assault occurred. Petitioner does not quarrel with this holding.

Petitioner does maintain that the facts of the instant case give rise to the inference that Sue Blevins was a sexual manipulator, skilled in prostitution, who in the past had used sex to destroy marital relationships such as the one the Petitioner had with his wife, and Sue Blevins had a motive to injure the Petitioner in using this type of activity in the instant case. These additional, factual inferences make the evidence probative and provide the reason why the application of the "Rape Shield Statute" violated Petitioner's right to confrontation.

III. THE COURT OF APPEALS OF KENTUCKY INCORRECTLY RULED THAT IT WAS NOT NECESSARY TO GIVE THE CORROBORATION INSTRUCTION REQUESTED BY PETITIONER.

The Kentucky Supreme Court in *Commonwealth* v. *Brown*, 619 S.W.2d 699 (Ky. 1981) held that the accomplice instruction was required in cases where the crime occurred while Ky. Rev. Stat. RCr 9.62 was in effect, the same situation as the instant case.

The Respondent's brief at page 16 in essence admits that there was an *ex post facto* violation and that *Commonwealth* v. *Brown*, 619 S.W.2d 699 (Ky. 1981) is controlling on this point. However, Respondent urges this Court merely to consider it as harmless error.

The error was not harmless because the only witnesses who connected Petitioner with the crime were not corroborated, and the other witnesses said Petitioner was not involved. Therefore, the only way Petitioner could have been convicted of promoting prostitution was to disregard Ky. Rev. Stat. RCr 9.62. In that situation, the error could never be harmless!

IV. RESPONDENT'S AUTHORITIES ON THE ISSUE OF WHETHER PETITIONER'S TRIAL DENIED HIM DUE PROCESS OF LAW ARE NOT ON POINT.

Respondent cites the case of *United States* v. *Williams*, 548 F.2d 288 (8th Cir. 1977) for the proposition that Respondent could play the tape recording four times during the trial and allow the tape to be

played repetitively in the jury room. The cited case merely holds that a jury correctly may request that a taped conversation introduced once into evidence may be played a second time for the jury during its deliberation if the jury so requests. The cited case deals with a situation which does not remotely resemble the instant case.

Further, Respondent cites a Kentucky rule of criminal procedure for the proposition that the jury may take all things introduced into evidence into the jury room. While the cited rule superficially agrees with Respondent's contention, the interpretation of this rule in Kentucky case law shows the Respondent's position to be incorrect. The jury may not take depositions into the jury room. *Louisville H. & St. L. Ry. Co.* v. *Morgan*, 62 S.W. 736 (Ky. 1901), *Security Finance Co.* v. *A. L. Cook & Son*, 3 S.W.2d 187 (Ky. 1928), *Thompson* v. *Walker*, 565 S.W.2d 172 (Ky. App. 1978), *Williams* v. *Watson*, 268 S.W. 1067 (Ky. 1925). Neither may the jury take indictments to the jury room in criminal cases. *Richardson* v. *Commonwealth*, 483 S.W.2d 105 (Ky. 1972).

Regardless of whether this procedure would be proper under Kentucky procedural rules, the use of the tape recording in the jury room denied Petitioner due process of law.

Respondent argues that Petitioner was not denied due process because the trial court did not violate its own order concerning the accountability of Petitioner

for the acts of his co-defendants. Under the "complicity" statute, Petitioner would have been guilty either by aiding or abetting or by engaging in a conspiracy. As shown at page 8 of the original petition, the Respondent expressly represented that no conspiracy was involved and that Petitioner's guilt was by being an aider or abettor to co-defendants, Johnson and Rucker. Nothing was said about Gary Blevins. This was embodied in an order signed by the court and entered into the record. However, the court instructed the jury that Petitioner was responsible for Gary Blevins' conduct even in face of the representation and order negating the existence of a conspiracy. Respondent attempts to rationalize this miscarriage of justice by stating that Respondent's trial counsel in a written response to Petitioner's discovery motions noted it would rely upon Gary Blevins' conduct. While such a representation was made by Respondent, the Petitioner was entitled to rely upon the order of the trial court and the representation that no conspiracy was involved instead of the Respondent's assertion as to its proof.

CONCLUSION

The courts of Kentucky have ignored and refused to follow the decisions of this Court and the provisions of the United States Constitution. The writ of certiorari should issue.

Respectfully submitted,

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